IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal under and in terms of Article 154P(6) of the Constitution read with Section 11(1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 331 of the Code of Criminal Procedure Act.

Nimal Pinsiri Godakandeniyage alias Nimal Pinsiri
No. 101, Jayanthi Gramaya,
Saliyapura,
Anuradhapura.

Accused – Appellant

Court of Appeal
Appeal No. CA 77/2014

High Court Anuradhapura
Case No. HC 174/2012

Vs.

Honourable Attorney General
Attorney General's Department,
Colombo 12.

Respondent

Before:	Hon. Justice Yasantha Kodagoda, PC President, Court of Appeal
	Hon. Justice Arjuna Obeyesekere Judge of the Court of Appeal
Counsel:	Anura Meddegoda, PC with Nadeesha Kannangara for the Accused – Appellant.
	P. Kumararatnam, Senior Deputy Solicitor General for the Respondent.
Argued on:	31st July 2019
Decided on:	18th November 2019

Judgment

Hon. Yasantha Kodagoda, PC, President, Court of Appeal

This is an Appeal against a conviction and sentence pronounced by the High Court of Anuradhapura, in case No. HC 174/2012.

On 5th November 2012, the Respondent - Honourable Attorney General had indicted the Accused - Appellant in the High Court of Anuradhapura in respect of his having allegedly committed the offence of 'Grave Sexual Abuse', an offence in terms of Section 365B(2)(b) of the Penal Code, as amended by Acts No. 22 of 1995 and No. 29 of 1998. He is alleged to have engaged in a serious, horrendous and most repulsive act of sexual abuse on one HK (actual name withheld due to the need to protect the privacy of the supposed victim), a female child less than 16 years of age. Following trial, the Accused - Appellant had been found *guilty* and convicted by the learned High Court Judge. He had been sentenced to a period of 20 years rigorous imprisonment and ordered the payment of a fine of Rs. 2,500/=, in default 6 months simple imprisonment. Further, compensation payable to HK amounting to Rs. 1,00,000/= had been ordered, with a default sentence of 6 months simple imprisonment.

During the Appeal hearing, learned President's Counsel appearing for the Accused - Appellant submitted that, during the trial, the Accused had in his defence made a *dock statement* which was exculpatory in nature and included an *alibi* position. He further submitted that, as evident from the judgment of the High Court, the learned High Court Judge had not given due consideration to the said evidence of the Accused. He also submitted that, non-consideration of the contents of the *dock statement* made by the Accused - Appellant had seriously prejudiced him, particularly as the evidence for the prosecution and the defence had been led before one Judge of the High Court, and the evidence had been considered and the judgment pronounced by a different Judge of the High Court. On this ground alone, learned President's Counsel for the Accused - Appellant submitted that the conviction entered by the High Court against the Appellant cannot stand, and should be quashed by this Court. He urged that the case be remitted to the High Court for a *re-trial*. He submitted that, if he were to receive that relief, he would be content. In the circumstances, consideration of the Appeal will be limited to that ground of appeal.

Learned Senior Deputy Solicitor General for the Respondent - Honourable Attorney General submitted that, he had considered the contents of the Case Record and the Appeal brief, and that he was of the view that, the submission made by learned President's Counsel for the Accused - Appellant was quite correct. He submitted that he was of the view that, in the interests of justice the conviction of the Accused - Appellant should be quashed and the case remitted back to the High Court for a *re-trial*.

It is necessary for this Court to record that the submission made by the learned Senior Deputy Solicitor General is reflective of professional standards and ethics expected from public prosecutors. Counsel representing the Honourable Attorney General are not expected to make submissions with the view to somehow 'winning' cases under whatsoever circumstances, and are expected to be true counsel assisting court in the administration of justice, and therefore expected to concede points advanced by their opponents that would facilitate the proper administration of justice. That is why it is said that the role of the Attorney General in criminal matters is *quasi-judicial* in nature. The submission of the learned Senior Deputy Solicitor General is in accordance with that high professional standard. Thus, this Court appreciates and commends the submission made by learned Senior Deputy Solicitor General.

This Court has also examined the Appeal brief and the original case record of the High Court. This Court was shocked to observe that, the learned High Court Judge had in the judgment made no reference at all to the *dock statement* made by the Accused. There is no reference to the 'defence evidence' of the case, let alone an analysis of evidence of the defence and conclusions the court had reached from such evidence. The only inference that can be drawn from the said failure is that, when the learned High Court Judge considered the evidence of the case, she has not given due consideration to the defence evidence of the case. In fact, the consideration of evidence by the learned High Court Judge has been completely one-sided and in favour of only the prosecution. Therefore, this Court concludes that the learned High Court Judge has arrived at the finding of *'guilty'* upon only considering the evidence led by the Prosecution. Thus, this Court observes considerable merit in the submissions made on behalf of the Appellant by the learned President's Counsel for the Appellant.

A criminal trial in Sri Lanka's system of administration of justice is an adversarial process in which both sides to the case, i.e. the prosecution and defence are entitled to present evidence in support of their respective cases. Unless the Accused pleads *'guilty'* to the charge, the prosecution is obliged by law to present evidence and prove its case beyond 'reasonable doubt'. Unlike the prosecution, the defence is not obliged to present evidence. However, the defence is entitled to present evidence. Either by impugning the evidence of the prosecution and / or by presenting defence evidence, the duty cast on the defence is to create a 'reasonable doubt' regarding the case for the prosecution. The overall scheme relating to the procedure to be followed in the conduct of criminal trials as contained in the Code of Criminal Procedure Act is in conformity with the rules of 'natural justice'. The rules of natural justice require the judge who is called upon to adjudicate, to do so, objectively, after hearing and considering the evidence presented on behalf of both the prosecution and the defence. Objective consideration of evidence requires the judge to take into consideration all relevant facts and disregard any irrelevant facts. In

determining what facts would be relevant as opposed to irrelevant facts, the trial court will be guided by legal principles contained in the Law of Evidence, as opposed to concepts of logical relevance.

The impugned Judgment of the trial court reflects the manner in which the trial judge has performed her duty of having arrived at the adjudicatory outcome of the trial, namely the *'verdict'*. In this instance, the judgment of the High Court does not reflect that the learned trial judge has considered the defence evidence of the case. Thus, there is no basis to conclude that the learned High Court judge has objectively and comprehensively considered the totality of the evidence placed before him. That is a fatal omission, and it negates the lawfulness of the judgment, because it is not a mere technical failure, but a substantial failure, which has necessarily occasioned a miscarriage of justice.

In this regard, it would be pertinent to consider section 283(1) of the Code of Criminal Procedure Act, which reads as follows:

> *The judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies* ***shall contain the point or points for determination, the decision thereon, and the reasons for the decision.*** (emphasis added)

It would thus be seen that, the Code of Criminal Procedure Act requires the judgment to contain the following among other features:

- Points for determination
- Decisions of the Court with regard to such points
- Reasons for such decisions

Therefore, where an Accused makes an exculpatory *dock statement* (as it is often the case), the learned trial judge is required to decide whether or not to accept the position of the Accused, and give reasons for his decision. In the instant case, the learned High Court should have (a) referred to the nature of the *dock statement* made by the Accused, (b) pronounced his decision to reject the contents of the *dock statement*, and (c) given reasons for the rejection of the *dock statement*. The absence of these features in the impugned judgment renders such judgment voidable. In the circumstances of this Appeal, this Court must hold that the impugned judgment is not in compliance with the rules of natural justice, incompatible with Section 283(1) of the Code of Criminal Procedure Act, and is therefore, unlawful.

The trial judge objectively considering the position taken up by an accused in the course of a trial and arriving at a finding on such position, is also an indispensable ingredient of a *fair trial*. In terms of Article 13(3) of the Constitution, any person charged with an offence shall be entitled to be heard, in person or by an Attorney-at-Law, **at a fair trial** by a competent court. (emphasis added) Thus, all accused have a fundamental right to a *fair trial*. It is

the duty of all organs of the State including the judiciary to recognize, uphold, protect and adhere to fundamental rights of all persons.

In view of the foregoing, the verdict of this case found in the defective judgment cannot be allowed to stand. In the circumstances, this Court in the exercise of its appellate powers, hereby quash the verdict of High Court Anuradhapura case No. HC 174/2012 and also the sentence imposed by the learned High Court Judge of Anuradhapura imposed on the Accused - Appellant.

However, a consideration of the evidence placed by the prosecution reveals that, there exists a valid basis for the Honourable Attorney General to have indicted the Accused - Appellant for having committed the offence of 'Grave Sexual Abuse' on HK. There is sufficient ex-facie evidence, based upon which the Accused - Appellant could have been lawfully found *guilty* and accordingly been 'convicted'. Thus, it would be a travesty of justice to 'acquit' the Appellant altogether. However, it would be necessary for the learned trial judge who is called upon the hear this case afresh, to permit the prosecution and the defence to present evidence, and thereafter independently assess and determine (i) the credibility of the prosecution witnesses, (ii) the testimonial trustworthiness of prosecution testimonies, and (iii) determine the sufficiency of the evidence presented by the prosecution in the discharge of its duty of proving the constituent ingredients of the charge. Similarly, the learned trial judge would have to consider the evidence (if any) presented by the defence, prior to reaching any conclusion. The final verdict should also be founded upon a consideration of the duty and burden of proof cast on the prosecution and the defence in terms of the Law of Evidence and a satisfaction of such duty and burden.

It is necessary to remember that one objective of criminal justice is to ***after a lawful and fair trial (which should be preceded by a lawful criminal investigation), to have perpetrators of crimes found guilty and convicted of having committed such offences and to cause punishment to be imposed on such convicted persons in terms of the law, and to cause the acquittal of innocent persons if such innocent persons are being prosecuted.*** Thus, it is incumbent on this Court not to 'acquit' the Appellant, but to quash the conviction and sentenced imposed on him and thereby 'discharge' him and order the conduct of a *re-trial*.

Accordingly, the High Court Judge of Anuradhapura is hereby directed to conduct a fresh trial, based on the afore-stated Indictment of the Honourable Attorney General dated 5th November 2012.

It is to be noted that, as a *re-trial* has been ordered by this Court, the alleged victim HK will have to necessarily testify once again relating to, as previously testified to by her, an incident during which she was subjected to grave sexual abuse. If her testimony is truthful, giving evidence regarding such an incident

of sexual abuse would necessarily cause psychological trauma, which amounts to 'secondary victimization' of a victim of child sexual abuse. Criminal justice should ideally not have any component or process that will give rise to secondary victimization of victims of crime. No victim of crime should as a result of having to participate in the criminal justice system, be subjected to secondary victimization. Complete prevention of secondary victimization is the ideal goal, and if that cannot be achieved, every possible measure should be taken to minimize secondary victimization. Secondary victimization during a criminal trial can be minimized by several ways. They include, the following:

(i) By ensuring that a conducive environment exists in court whereby the victim could testify voluntarily and freely, without any fear of intimidation, retaliation or reprisals.

(ii) By ensuring that the Accused as well as other persons acting on behalf of the Accused does not pose a threat to the victim of crime before, during and after the trial.

(iii) By conducting the trial in a manner, so that the evidence of the victim of crime is recorded on the very first day the victim appears before the trial court on Summons.

(iv) By completing the recording of the evidence of the victim either on the same day or on the next consecutive day.

(v) By the trial judge exercising effective control over the examination of the victim of crime by counsel and maintaining vigilance, by ensuring that the examination of the victim by both the prosecuting and defence counsel is not inappropriately or unnecessarily lengthy or repetitive, is not harsh, is not unnecessarily intrusive or scandalous, and is not aimed at causing psychological trauma to the victim of crime or preventing the victim from testifying truthfully.

It is the duty of trial judges to minimize if not prevent secondary victimization of victims of crime during the trial, and it is the responsibility of the State to provide necessary logistical facilities and other resources to courts of law, that would enable the judiciary to provide and maintain a conducive environment in which victims could testify freely. Provisions of the Assistance to and Protection of Victims of Crime and Witnesses Act No. 4 of 2015 can and should be invoked to ensure that secondary victimization of victims of crime both during and sequel to their providing testimony in court is kept at a bare minimum.

It is the expectation of this Court that, the learned High Court Judge of the Anuradhapura High Court in the conduct of the *re-trial* ordered by this Court, and all other High Court judges in the course of conducting trials and when adjudicating, will respect and enforce the principles referred to in this Judgment.

Accordingly, this Appeal is allowed and the Appellant is discharged.

The Appellant is in remand custody, following the imposition of the sentence, filing of the Petition of Appeal and pending the determination of this Appeal. In the circumstances, the Superintendent of Prisons is directed to forthwith release the Appellant from remand custody.

The Registrar of this Court is directed to file a certified copy of this Judgment and forthwith return the case record of High Court Anuradhapura case No. HC 174/2012 to the Registrar of the High Court of Anuradhapura.

Upon receipt of the said record, the learned High Court Judge of Anuradhapura is directed to take steps to (a) commence the *re-trial* of the Appellant as soon as possible by forthwith issuing Summons on the Appellant, and fixing the case for trial, and (b) hear the case day-to-day and conclude the case as soon as possible.

The Appellant is directed to appear before the High Court of Anuradhapura, on receipt of Summons.

Justice Yasantha Kodagoda, PC
President, Court of Appeal

I agree.

Justice Arjuna Obeyesekere
Judge of the Court of Appeal